IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-1394

PAUL LABRIOLA and DAWN SLOMKA,

Petitioners,

-against-

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TABLE OF CASES CITED

TABLE OF CASES CITED CONT.

TABLE OF STATUTES CITED

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To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The above named petitioners respectfully pray this Court for a writ of certiorari to the United States Court of Appeals for the Second Circuit as follows:

A.

OPINION BELOW

The United States Court of Appeals for the Second

Circuit by judgement entered on the 4th day of March, 1976, unanimously affirmed a judgment in the United States District Court for the Eastern District of New York convicting petitioners of Conspiracy to forge and alter United States Savings Bonds, and forgery thereby in violation of 18 U.S.C. 371, 495 and 1708, after a non-jury trial in the United States District Court for the Eastern District of New York before Hon. Mark A. Costantino.

Opinions were written by the District Judge and by the Court of Appeals, copies thereof are annexed hereto as Exhibits A and B, respectively.

B.

THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

Jurisdiction of this Court is invoked under Title 28, Section 1254, subdivision 1 of the United States Code, and under Rule 19, subdivision 1 of the Rules of this Court.

The judgment sought to be reviewed herein is the judgment of the United States Court of Appeals for the Second Circuit entered on March 4, 1976 as aforesaid. A copy is annexed hereto as Exhibit C.

C.

THE QUESTION PRESENTED FOR REVIEW

1. Was the eavesdropping warrant of July 5, 1972 obtained in violation of petitioner Labriola's constitutional rights?

2. Did the ensuing eavesdropping warrant of July 27, 1972 lack the probable cause required by the United States Constitution?

3. Did the conceded failure to properly minimize interceptions obtained in executing the July 27th warrant by continued bugging after the hours specified in the warrant require a suppression of all intercpetions obtained under said warrant?

4. Did the failure of the District Attorney to serve the statutory 90 day notice of eavesdropping require a suppression of the evidence obtained under the July 27th warrant and succeeding warrants?

D.

STATUTES INVOLVED

The statutes involved are New York Criminal Procedure Law, Sections 700.65, 700.20, 700.25, 700.50 (3) and Title 18 U.S.Code §2518 and U.S. Constitution, Amendments 4 and 14 and New York Constitution, Article I, Paragraphs 6 and 14. Each of the foregoing is set forth in Appendix D of this petition.

E.

A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO CONSIDERATION OF THE QUESTIONS PRESENTED

1. Statement of the case

Petitioners and others were jointly indicted in the United States District Court for the Eastern District of New York under Indictment No. 73 CR 972, charging them with various counts of Conspiracy of Passing Stolen U.S. Savings Bonds by forging the endorsements of the true owners in order to cash them.

A pre-trial motion was held before Hon. Mark A. Costantino to suppress evidence obtained as the product of various wiretap and bugging orders issued out of the New York State Supreme Court of Kings County (Vetrano, J.). These orders and the conversations intercepted thereunder were subsequently turned over the the Government and formed the basis of the instant prosecution.

No eavesdropping warrants were obtained by Federal agents.

The suppression hearings commenced January 28, 1975 and concluded February 10, 1975 with the decision of Judge Costantino on that day.

That same day a non-jury trial was held before Judge Costantino. Following the trial (in which Government's evidence was received by stipulation, over objection, as being the product of illegal eavesdropping), the Court found petitioner Slomka guilty of conspiracy and, additionally, found petitioner Labriola also guilty of forgery.

On April 4, 1975, petitioner Labriola was sentenced to a five (5) year jail term and a fine of $5,000.00. Execution of sentence was stayed pending appeal.

On April 18, 1975, petitioner Slomka was sentenced to a prison term of three (3) years, execution of which was suspended and she was placed on probation for three (3) years.

Petitioner Labriola is presently incarcerated in a New York State prison under another charge involving the same wiretap and bugging orders which will form a separate petition for certiorari to be filed in this court.

2. Statement of facts

The pertinent facts are set forth under the appropriate Points in this petition, and accordingly, are not reiterated herein.

F.

BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Eastern District of New York was invoked upon the ground that the crimes charged were violations of Federal Law, to wit: 18 U.S.C. §371, 495 and 1708.

G.

ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

POINT ONE

THE EAVESDROPPING WARRANT DATED JULY 5, 1972 WAS EXECUTED IN VIOLATION OF PETITIONER LABRIOLA'S CONSTITUTIONAL AND STATUTORY RIGHTS. THE EVIDENCE THEREBY OBTAINED SHOULD BE SUPPRESSED AS WELL AS THE EVIDENCE OBTAINED UNDER THE FOUR EAVESDROPPING WARRANTS THEREAFTER OBTAINED AS A RESULT THEREOF.

On July 5th, 1972, Mr. Justice Vetrano, sitting in Supreme Court, Kings County, signed a warrant authorizing the District Attorney of New York County to intercept telephone conversations over a semi-public telephone, number 377-9840, at S.L.A. licensed bar in Brooklyn known as the 1-2-3-4 Club.

The warrant was predicated upon allegations by Assistant District Attorney, Leonard Newman that one Joseph Martino, acting under the code name "Paul", was using that telephone to converse with an alleged informant named Stanley Reinhardt for illicit dealing in the alleged Unlawful Possession and Sale of certain U.S. Postal Bearer Bonds and unspecified Industrial Bonds.

The warrant authorized the interception of Martino's conversations over said telephone and "his co-conspirators, agents and associates", in connection with the aforementioned crimes.

Although the warrant was effective for 30

days commencing July 5th, it was not implemented until July 11th, because the subject telephone was out of order until July 11th.

Prior to implementing the order, the police officers who were to overhear and record the telephone communications were instructed to listen to previously obtained recordings of conversations between Reinhardt and Martino in order to become familiar with the voice of Martino.

Additionally, Seargent Bicina, who was supervising the interceptions, was told by Assistant District Attorney Newman to instruct his men not to record privileged or social conversations, but to record:

> "all conversations with respect to Joseph Martino, a person known to us at that time as "Ralph" and that anyone who responded to the name of "Paul" when that number is called, and discussed the theft of negotiation or disposition of stolen securities, or anyone calling that number and engaging in conversations with the inside parties about the theft or disposition as to the disposition or negotiation of stolen securities."

Newman further testified as to instructions given him by dealing with conversations by persons named Paul. He stated:

> "Q. Now, did you give them any instructions as to what they were

to do if somebody called Paul and answered the phone and they realized that is your people overhearing the conversation realized that the Paul who answered the phone was not Joe Martino?

"A. If that person who responded to the name Paul when called, if he was engaged in a conversation concerning stolen securities in any respect whatsoever, that call was to be recorded."

The police also undertook a surveillance of the 1234 Club. They learned, by July 6th (prior to commencing telephone interception) that Paul Labriola frequented the Club and had a police record involving stolen checks.

On July 11th, the telephone interception began. Among the calls intercepted that day were three to a party named "Paul". The voice of "Paul" was the same in all three calls. Detective Huller did not know who either party was.

Although the tapes of telephone conversations between Reinhardt and Martino were readily available to the officers overhearing the 1234 Club telephone, they never listened to it after the tap was installed to compare the voice of Martino with the voice of "Paul" on the 1234 tap to ascertain whether "Paul" was the Martino named in the July 5th warrant or some other "Paul" who was not named in the order.

Detective Huller, after listening to the entire first conversation between the unknown

"Paul" and the unknown other party, said he didn't know whether the conversation pertained to his investigation.

Huller also listened to the entire second conversation on July 9th, although he did not know who "Paul" or the other party was. He stated that there was no reference to industrial bonds or postal bonds which were the subject of the eavesdropping warrant. He attempted to justify his listening to the conversation by saying that he felt reference to the "piece" as "I.D's" would have had a bearing on the case.

The third conversation was also recorded without knowing who the parties were. Huller described the conversations as "cryptic" because there was reference to "I had to get somebody out" and "Did he pick up the things he was supposed to pick up?" As Huller put it "That could have a bearing. I don't know what, but possibly it could."

Huller testified that Detective Boyle, after hearing "Paul" arrange over the tapped phone to meet someone, followed "Paul" to the appointed place.

On July 12th, two more conversations of the same "Paul" were intercepted in toto between "Paul" and one "Ted".

The entire first conversation simply related to one of the parties arranging to meet the other at "Nick's" in 15 minutes.

The second conversation of July 12th was an unkown male calling into "Paul". The unknown

male said "They paid them" and I need a couple of bucks", Paul arranged to meet the unknown male at a candy store.

Huller, although stating that he wanted to know who "Paul" was and whether the voice was Martino's, acknowledged that he would have listened to the entire conversation even if it turned out not to be Martino. (Huller still did not bother to listen to the Reinhardt tapes containing Martino's voice to compare it with the voice he was intercepting at the 1234 Club.

Huller then left the plant immediately after hearing "Paul" arrange to meet the unknown male at a candy store on Coney Island Avenue. He followed the man who left the 1234 Club to the place referred to in the tapped conversation. The man was Paul Labriola.

Huller later informed Seargent Bicina that the "Paul" they were tapping was probably Paul Labriola and not Joseph Martino.

On July 14th, he intercepted a conversation between Paul Labriola and a person he believed was Joseph Martino at the 1234 Club. He, now admittedly knew that the "Paul" he had been recording on the wire tap was not in fact the Joe Martino referred to in the July 5th warrant.

Thus by certainly no later than the 4th day of the intercepting calls, and perhaps as early as the 2nd day of interception, the police knew they were tapping the conversation of a party not named or authorized to be tapped in the July 5th warrant, to wit, the conversation of Paul Labriola.

At this point the police were under a constitutional as well as a statutory mandate to discontinue tapping Labriola's conversations until they obtained a warrant to intercept Labriola's conversations.

The police, however continued to intercept Labriola's conversations between July 14th and July 27th without obtaining a warrant authorizing such tapping.

More specifically, between July 14th and July 27th, Detective Huller and his fellow officers intercepted and recorded twenty (20) completed phone conversations to which Labriola was a party. None of the other parties to whom Labriola spoke were known to the police.

Seargent Bicina testified that by July 13th, or in any event not later than July 14th, he informed Assistant District Attorney Charles Clayman (who was supervising the investigation) that based on a series of tapped conversations he now felt that "it was Paul Labriola and not the Joe Martino known as "Paul" whose conversations they had been intercepting and "we felt that there should be an amendment" Clayman replied that it would be done when the order was due for renewal.

Thus on July 14th the District Attorney (after only four days of intercepting conversations) delayed seeking a modification of the warrant until July 27th - a thirteen day period in which they continued without abatement or minimization to unlawfully intercept Labriola's conversations. In fact on July 14th, Assistant District Attorney, Clayman specifically instructed Bicina to none-

theless continued to intercept Labriola's conversations.

Two of those post July 14th conversations were submitted in support of the amended order signed by Judge Vetrano on July 27th (see Point Two, supra).

The issue here presented is whether the police had a constitutional right to continue, without applying for an amended order, to intercept Labriola's telephone conversations up to July 27th where they knew by July 12th or at the latest July 14th, that Paul Labriola was not in fact Joseph Martino (a/k/a Paul), that was named by Mr. Justice Vetrano in his July 5th warrant.

Certain preliminary observations are in order in considering this issue:

(a) The July 5th warrant was predicated exclusively upon information relating to the theft of specifically described Postal Bearer Bonds and an undetermined quantity of "industrial" bonds. No other type of stolen property is described in the affidavit or the warrant.

Thus the conversations to be intercepted must be deemed limited to authorizing only "a particular description of the type of communications sought to be intercepted" (Criminal Procedure Law §700.30). To allow the scope of the warrant to go beyond such limitations would result in a constitutionally prohibited general warrant (U.S. Const., Amendments 4 and 14; N.Y. Constitution Article 1, §6 and 12; Berger v. New York, 87 S.Ct. 1873, 388 U.S. 41).

(b) The two July 21st conversations recorded and submitted to Mr. Justice Vetraon on July 27th in support of the amended order to include Labriola as a party whose conversations might be intercepted were clearly conversations outside the scope of the July 5th warrant.

By Mr. Clayman's own affidavit of July 27th those conversations could have related to stolen checks or any other kind of stolen security (affidavit, p. 4). Indeed Mr. Clayman's affidavit of July 27th (p. 5) interprets the conversation of July 21st to refer to some new future theft of an unspecified quantity of undescribed securities -- certainly not under any interpretation the previously stolen Postal Bonds or industrial securities.

Thus the intercepted conversations related to crimes not specifically referred to in the July 5th order. As such, an amended order should have been obtained "as soon as practicable" after July 12th or certainly after July 14th. Yet the District Attorney when apprised of this by Seargent Bicina in July 13th or July 14th, deliberately and consciously determined not to seek an amendment until July 27th and specifically directed that the wiretapping of Labriola's conversations nonetheless continue unabated.

This type of situation was considered by the Appellate Division, First Judicial Department in People v. DiStefano, 45 A.D. 2d 56, 356 N.Y.S. 2d 316, appeal to N.Y. Ct. of Appeals pending).

In DiStefano, a wiretap order not naming the defendant was issued. On April 6th, police intercepted a conversation between defendant and a-

nother person not named in the warrant in which a prospective robbery was discussed. This crime was not within the scope of the warrant.

On April 17th, further conversations dealing with the robbery were overheard between defendant and others not named in the order. As a result of those conversations, the police undertook surveillance of the defendant and ultimately charged him with Conspiracy and Attempted Robbery.

On May 5th the District Attorney obtained an order amending and renewing the earlier warrant. The supporting affidavit referred only to the April 17th conversations.

The Appellate Division suppressed the evidence and dismissed the indictment. Mr. Justice Tilzer wrote at 356 N.Y.S. 2d 320-322:

> "Considering first the contents of the communications intercepted on April 17, 1972 and the evidence derived therefrom, we do not believe that such evidence was properly admissible or within the scope of CPL 700.65 (4). As previously indicated the provision permitting an amendment to include matter not originally sought was intended to make admissible evidence which was lawfully obtained in the course of executing the warrant but which resulted from unanticipated or unexpectedly overheard conversations, unrelated to the eavesdropping warrant. The police officers and

Assistant District Attorney herein, were, since April 6, 1972, alerted to the plans for the robbery and thereafter when they continued to intercept communications eleven days later, which were not within the scope of the eavesdropping warrant, did so for the specific purpose of obtaining further evidence of the new crime. Accordingly, it cannot be said that the April 17th conversations were unexpectedly overheard. (See United States v. Cox, 10 Cir., 449 F 2d 679, 687.) To allow testimony as to the contents of such communications (and with respect to evidence derived therefrom) when the evidence was intentionally obtained, without prior court scrutiny, would permit the District Attorney, in his own discretion to expand the entire scope of the eavesdropping warrant, and to thereafter elgitimize such action by a subsequently obtained court order. The statute was not so intended and if it is interpreted in that manner there would be grave doubt as to its constitutionality. (See Katz v. United States, 339 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576; Berger v. New York 388 U. S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040).

The nature and purpose of the provision permitting amendments to include unanticipated conversa-

tions was considered in People v. Ruffino, 62 Misc. 2d 653, 309 N.Y.S. 2d 805. In that case it was held that a delay of over three months in seeking amendment did not render inadmissible evidence which otherwise was legally intercepted. It was concluded that since only one conversation was intercepted and thereafter the wiretap was immediately discontinued defendant's rights were not affected by the failure to comply with a statutory condition subsequent. However, the Court (Shapiro, J.), stated:

> 'It seems apparent that the purpose the lawmakers had in mind, in requiring an amendment of an outstanding interception order where new criminal matters not specified in the warrant came to light over the wiretap, was to legalize the continuance of the wiretap to discover further evidence of the newly disclosed crimes... The failure to obey the statutory requirement that an amended order be obtained should bring into play an exclusionary rule only where the interception, continues after an unprovided-for conversation is overheard, for it is only the continuation of the wiretap which makes judicial supervision necessary for the protection of Fourth Amendment rights of privacy. "(People v. Ruffino, supra, 62

Misc. 2d pp. 660-661, 309 N. Y.S. 2d p. 812.)"

Further, the application for amendment must be made "as soon as practicable". That provision is not complied with where there is considerable delay after acquisition of knowledge of the new crimes, and where prior to making the application, the People, nevertheless, continue interception of matters not within the scope of their court authorization.

Accordingly, we conclude that the conversations intercepted on April 17th and the evidence obtained as a result were inadmissible and that the motion to suppress such evidence should have been granted.

A somewhat different problem is presented with respect to the April 6th conversation. That conversation was intercepted without prior knowledge of defendant's activities and accordingly, may be considered to have been unexpectedly overheard and within the scope of CPL 700.65 (4). If a motion to amend the order had been made to include such conversation we would be confronted with a similar issue as presented in People v. Ruffino, supra, i.e., whether the failure to amend as soon as practicable renders inadmissible evidence otherwise legally obtained. Of course, the issue herein, is further complicated since unlike the situation in Ruffino, the People continued to

> wiretap in search of further evidence, and accordingly, the failure to make a timely application herein, even relating soley to April 6th, could be considered more than a technical defect. We need not, however, pass upon this question for several reasons. First, the affidavit in support of the application to amend was limited solely to the conversations and events relating to April 17th. While the daily plant reports were submitted, such does not mean that the order extended to each and every conversation set forth in those reports. Such would be entirely too broad, and was neither permissible nor intended. Accordingly, the conversation of April 6th should have been suppressed."

Accordingly, we respectfully urge that the conversations of Paul Labriola intercepted under the July 5th order and all those which followed be suppressed as well as any evidence derived therefrom.

POINT TWO

THE EAVESDROPPING WARRANT OF JULY 27, 1972 ISSUED BY MR. JUSTICE VETRANO, WAS NOT SUPPORTED BY PROBABLE CAUSE AS TO PAUL LABRIOLA

Mr. Justice Vetrano had originally issued a warrant for eavesdropping, dated July 5, 1972. The order did not name Paul Labriola. During the course of the eavesdropping under that warrant, the police intercepted various calls alleged to be those of Paul Labriola. Predicated upon those interceptions (see Point One, supra), the District Attorney of New York County applied for a further warrant, renewing and amending the July 5th warrant, so as to include Paul Labriola. On July 27, 1972, Mr. Justice Vetrano granted that order, which now included authority to install a bug into the 1234 Club, as well as to continue previously authorized wiretapping (see, opinion of Judge Costantino, annexed hereto as Appendix A).

It is, of course, axiomatic that an order for eavesdropping must be predicated upon probable cause. Additionally, the probable cause must appear within the four corners of the supporting affidavits when, as in the present case, the court took no further testimony or evidence prior to issuing the order.

Turning then to the July 27th order, we note the following with respect to its applicability to Paul Labriola.

The factual affidavit supporting the order

was that of Assistant District Attorney Charles Clayman. After reciting the prior order of July 5th, he went on to indicate that two conversations of a person described as "Paulie" were intercepted pursuant to the prior warrant. The first of these conversations referred to in paragraph 2(b) at pages 3 and 4 of Mr. Clayman's affidavit was as follows:

> "At 2:55 p. m. on July 21, 1972, Paulie (co-conspirator of Joe Martino, see paragraphs 23 and 24 of July 3, 1972 affidavit) made the following outgoing call.

Paulie (In)	I'll meet you 9 o'ciock at Coney Island "L&M"
Leon (Out)	Heh Heh
In	The luncheonette
Out	Yeah yeah what's new otherwise
In	Oh nothing
Out	Did you get what you were suppose to get?
In	We're getting them. He's got them, and we're getting tonight, so eh remember that thing that you needed that little stamp, do you still have it?
Out	Eh come again
In	Do you know the thing you needed the last time the stamp
Out	I needed
In	Yeah remember the last batch a long time ago
Out	Oh yeah yes yes yes yes yes
In	Do you still have that stamp?
Out	Eh' yes I have it right here

"In	Oh good because that's what we need
Out	That one with the eh
In	Yeah
Out	Wait wait a minute, wait a minute, I have the one with the date.
In	That's the one we need
Out	What about the other one
In	That one we needed the last time, we need again because they've the same thing."

To begin with we note that there is no allegation that the "Paulie" referred to is claimed to be Paul Labriola. Moreover, the conversation is between "Paulie" and a person named Leon. It must be born in mind that the original warrant authorized only the interception of calls involving Joe Martino and his co-conspirator, and that must be limited, for constitutional purposes, to the specific crimes being investigated, namely, allegedly stolen postal bearer bonds and industrial bonds.

Thus, it is immediately apparent that the parties named in the original order are not the parties to this conversation. Moreover, the conversation cannot be regarded as one having anything to do with United States postal bonds or industrial bonds.

The conversation, at most, is highly equivocal from which no inference of criminal conduct can or should be constitutionally permissible. The purported interpretation that stamps are used in connection with stolen bonds can give rise, at most, to a suspicion of improper

conduct, but even that is nothing more than a surmise. To hold otherwise, would be to hold that a conversation in ordinary English language, on its face innocuous could become a basis for probable cause merely on the subjective opinion of a Police Officer seeking to convert a guess into a factual basis at the level of probable cause. In any event, it must not be overlooked that the conversation in no way can give rise to an inference that the subject matter under discussion is postal bonds or industrial bonds as opposed to any other bonds if indeed it can be interpreted by any stretch of the forensic imagination to relate to bonds at all.

Even assuming that the quoted conversation could relate to criminal conduct involving stolen bonds other than postal bonds or industrial bonds, it would necessarily have to be treated as evidence of a new crime, not the subject matter of the original warrant and, consequently must be suppressed because the District Attorney did not obtain the amended order "as soon as practicable". (Criminal Procedure Law, Section 700.65: Point One, supra).

The second quoted conversation, occurring later the same day and found in paragraph 2(c), page 5 of Mr. Clayman's affidavit sheds no further light on the issue of probable cause. That conversation, in its entirety is as follows:

> "At 10:25 p. m. on July 21, 1972, Paulie received the following call:
>
> Joe — When you send the other thing put in an envelope but put tissue around it

Paul	I got the blank but I don't know if the other guy is around to type it up
Joe	Send it airmail special delivery. Send it to 160-20 Sepulveda Blvd. That's my name your using Joe Antonakes. I ran into something out here, I think I got something real big in the broke. It's worth about 200 big ones. I'll see you next week. Who do you have to wait for? Leon.
Paulie	Yeah he has to do the typing I met Leon tonight."

The arguments previously urged as to the first conversation are again applicable here.

Once again, the District Attorney sought to raise a conversation essentially innocuous on its face when taken literally, to the constitutional level of probable cause by interpreting the words "something real big in broke" as a criminal conversation allegedly dealing with stolen securities in brokerage houses and their shipment through the mail in the future. Objectively viewed, as it must be, the proposed interpretation is in reality, to paraphrase an old saying, a case of evil being in the eye of the beholder. Constitutional standards have always required an objective interpretation rather than a subjective one. From the point of view of objective interpretation, one can offer any number of interpretations of that conversation, ranging from the sublime to the ridiculous and come no closer to probable cause than the merest of surmise and conjecture.

The order on its face, patently lacks a fac-

tual basis for probable cause to believe that Paul Labriola was a conspirator of Joseph Martino in connection with the claimed theft and possession of stolen postal bonds or stolen industrial bonds (Criminal Procedure Law, Sections 700. 15, 700. 20 and 700. 25; Title 18 U.S. Code,,Section 2518; U.S. Constitution Article 4 and 14; New York State Constitution Article 1, Paragraph 6 and Paragraph 12).

It is therefore respectfully urged that the warrant of July 27, was not properly issued. Such warrant along with the succeeding warrants authorizing eavesdropping as to Paul Labriola should be held to be invalid and the evidence obtained thereunder or derived therefrom should therefore be suppressed in their entirety.

POINT THREE

THE EXECUTION OF THE WARRANT OF JULY 27, WAS CONSTITUTIONALLY IMPERMISSIBLE, IN THAT THERE WAS A CONCEDED FAILURE TO COMPLY WITH AND MINIMIZE THE EXTENT OF THE BUGGING DIRECTED UNDER SAID WARRANT

The warrant issued by Mr. Justice Vetrano on July 27, 1972 in addition to the statutorily required minimization clause contained the specific direction that the bugging authorized to take place at the 1234 Club be limited in that "such interception not occur after 7:30 p.m. on any day."

It appears from the testimony and from the exhibits consisting of the police logs of the bugged conversations pursuant to the July 27th warrant, that notwithstanding the cut-off hour of 7:30 p.m. that virtually each day, through and including August 30th the bugging continued inexorably and without any attempt whatever to comply with the order by terminating the bugging at 7:30 p.m. The evidence clearly reveals that the bugging, which was usually set into motion at approximately noon or earlier, recorded conversations from that time until well past midnight and the conversations taking place were unceasingly intercepted and recorded, in direct violation of Mr. Justice Vetrano's order of July 27th.

The United States Attorney concedes that there was indeed a failure to minimize, pursuant to the directions contained in Mr. Justice Vetrano's order of July 27th.

The Court below so found by its opinion at the

conclusion of the hearings (Appendix A).

In this connection, it should be noted that based upon a bugged conversation occurring on August 11, 1972, allegedly between Joe Martino and Paul Labriola at the 1234 Club and allegedly pertaining to the acquisition and cashing of counterfeit securities, the District Attorney of New York County obtained an order authorizing the continuance of the bugging of oral conversations at the 1234 Club.

During the period of the bugging under the July 27th order, a "bugged" conversation was recorded on August 15th among appellant Slomka, "Paul" and one "Willie" in which they discussed a "package" and "I.D.", presumably referring to identification documents. This conversation was "bugged" at approximately 10:00 p.m. - 2- 1/2 hours after the 7:30 p.m. cut-off hour specified in the July 27th order.

The instant case is distinguishable from the majority of cases that deal with the question of minimization. In the case at bar while minimization may be an issue concerning those conversations intercepted up to 7:30 p.m. as authorized by the court order we are now confronted with the question of appropriate sanctions to deter the recording of conversations after the authorized interception time.

In the ususal minimization situation nonpertinent conversations are not to be recorded in an effort to protect the constitutional rights of the individual. Courts when confronted with a violation of this mandate such as when all conversations are recorded must determine whether or not to suppress all conversations intercepted or just those taken

in violation of the minimization requirement. While it has been recognized that in certain situations it is difficult if not impossible to properly minimize, it has also been recognized that blatant violations of the court's order must be severly dealt with.

The order in the instant case specifically directed the intercepting officers to terminate their activities at 7:30 p.m. The officers nevertheless ignored said directive and continued recording thereafter.

In People v. Holder, 331 N.Y.S. 2d 557, 69 Misc. 2d 863, the court referring to a failure to follow minimization during a court ordered wiretap stated at page 570:

> "The intercept was never cut off and the surveilling agent did not even attempt 'lip service' compliance with the statutory mandate, but rather completely disregarded it.....
> from the record before this Court, it appears that the police intended to glean every conceivable shred of relevant conversation from every telephone call and thus they turned the eavesdropping warrant into a general search warrant and totally disregarded the direction in the warrant.....
> Such a practice cannot be countenanced by this Court."

The Court suppressed all the conversations intercepted in the Holder case (supra)

stating that "only by imposing such a severe penalty will compliance in the future be guaranteed".

While it is recognized that the Federal Courts are in disagreement as to whether nor not to suppress all conversations with United States v. King, 335 F. Supp. 523; United States v. Cox, 462 F. 2d 1293; United States v. LaGorga, 336 F. Supp. 190; and United States v. Mainello, 345 F. Supp. 863 holding for partial suppression and United States v. Scott, 331 F. Supp. 233; United States v. Focarile, 340 F. Supp 1033 holding for total suppression the New York Courts agree that total suppression is the more appropriate remedy when there is a blatant violation (See People v. Holder, supra, People v. Castania, 340 N. Y. S. 2d 829).

The method employed in the instant case was considered in U. S. v. Focarile, supra, when such violations were catagorized. The court in considering this type of violation stated at page 1046:

> "The first type of violation would be the one committed if there had been no attempt at all to minimize the interception of 'innocent' calls. This first type of violation would obviously be a blatant violation of Title III and, in addition, would probably violate the precept of the Fourth Amendment."

If this Court sanctions the actions of the prosecution in a case such as this it will be permitting court approved violations of an individuals' Fourth Amendment Rights.

> "Knowing, that only 'innocent' calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III." (U.S. v. Focarile, supra)

The United States Supreme Court in Berger v. New York, 388 U.S. 41 87 S.Ct. 1873, 18 L.Ed. 2d 1040 condemned the very procedures followed in the present case in holding the former New York statute unconstitutional because of its lack of particularity and control.

The Court in Berger v. New York, supra, recognized that it was virtually impossible to have an eavesdropping statute that was not violative of certain constitutional protections therefore leading us to urge herein that the New York statute must be held to be unconstitutional. With these possibilities in mind new statutes were drafted in New York with certain safeguards in an attempt to limit these constitutional infringments. Permitting a disregard for these safeguards brings us right back to the situation presented to the Supreme Court in Berger v. New York, supra and Katz v. United States, 398 U.S. 347, 88 S.Ct. 507, 19L. Ed. 2d 576.

The violation of the Court order in the present case is distinguishable from all the previously mentioned cases which authorized only partial suppression because of the continued recording after a specific definite termination time. The remedy is clear, as the Court stated in United

States v. King, 335 F. Supp. 523 at page 545:

> "That this Court has declined to suppress the entire wire interception should in no way be taken as judicial approval of the Government's tactics. By failing to minimize surveillance in accordance with the statute and the authorizing order, the Government has placed upon this Court the burden of effecting minimization, a situation hardly envisioned by the statute, and one which this Court does not willingly accept. The Government would do well to remember that the limited system which the statute creates is designed to prevent unreasonable invasions of privacy, not to repair them and that if those limitations are not voluntarily adhered to by the Government, total suppression may well prove to be the only feasible solution." (emphasis added).

Further, while there is a disparity of decisions among the Federal District Courts, concerning these issued, it must not be forgotten that New York State, while abiding by Federal law many construe statutes as well as constitutional amendments more strictly than the fedral courts imposing a greater duty upon the enforcers of its laws. This concept is apparent considering the previously cited state cases versus the federal decisions. There can be but one remedy in a situation such as this; that is, total suppression of each and every conversation intercepted as well as those developed following these improperly seized conversations.

POINT FOUR

THE FAILURE OF THE DISTRICT ATTORNEY TO SERVE THE STATUTORY 90 DAY NOTICE UPON THE APPELLANTS FOLLOWING THE TERMINATION OF THE EAVESDROPPING IN THE 1234 CLUB REQUIRES THAT THE EVIDENCE OBTAINED UNDER THE JULY 27th ORDER AND THOSE WHICH FOLLOWED BE SUPPRESSED

This phase of the case deals with Section 700.50 subd. 3 of the Criminal Procedure Law which provides that "in no case later than 90 days after the termination of an eavesdropping warrant or expiration of an extension order", written notice must be personally given to each person named in the warrant.

The pertinent facts dealt in this matter are the following:

1. On July 5th Mr. Justice Vetrano issued the first of a series of 5 eavesdropping warrants. That first order did not name petitioner Labriola.

2. On July 27th, Mr. Justice Vetrano amended and extended the July 5th order so as to include petitioner Labriola.

3. Three subsequent orders were thereafter issued each in turn dependent upon the prior order.

Det. Huller testified at the hearing that in executing the July 27th order for eavesdropping at the 1234 Club the eavesdropping plant was shut down and no further eavesdropping was undertaken after September 1st.

The reason for the termination was because the police knew that the 1234 Club was closed and nobody was there.

It is our contention herein that since the eavesdropping was deliberately terminated by September 1st the petitioner Labriola thereafter within 90 days from September 1st was entitled to the statutory notice pursuant to Criminal Procedure Law Section 700.50. Mathematically computed the 90 day period following September 1st would terminate on November 29th.

The minutes of the Supreme Court proceedings wherein the notices were served upon Labriola indicate that such service, (as found by Judge Costantino in his opinion below), occurred on December 13th, 1972, two weeks after the expiration of the 90 day period.

As to appellant Slomka, more than one (1) year elapsed before she received the "90 day" notice.

People v. Huston, 34 N.Y. 2d 116, 356, N.Y. Sub. 2d 272. New York Court of Appeals dealt with the question of giving the statutory notice. Judge Rabin writing for a unanimous court said at 34 N.Y. 2d 121:

> "The People admit that they did not give the written posttermination notice required by the statute. While we may assume that the lack of such notice might ordinarily require suppression of the evidence obtained as a result of the warrant (see People v. Tartt, 71 Misc. 2d 955, 336 N.Y.S. 2d 919, supra), we believe that the special circumstances present in this case

"compel a different conclusion."

The Court than detailed the unique circumstances which governed its decision in this case. The case at bar however, presents no such extraordinary situation upon which the government can rely to relieve itself of the fault. The underlying juridical philosophy applicable here are in words expressed in U. S. v. Giordano, 469 F. 2d 522, 530:

> "We cannot relegate provision after provision to oblivion by terming each a mere 'techincality' - or else we leave the statute a shadow of itself, an apparition without substance'".

An interesting corollary is found in the case of Olmstead v. U.S. , 277 U.S. 438, 458, 48 S.Ct. 564, 575:

> [when]"government becomes a law breaker, it breeds contempt for law".

See also People v. Kennedy, 75 Misc. 2d 10 347 N. Y. Supp. 2d 327.

It is therefore respectfully submitted that the failure to give the 90 day notice was a matter of substantial right designed to prevent the Government from encroaching upon constitutionally guaranteed rights of privacy by giving notice of recent eavesdropping to persons named in an eavesdropping warrant.

It would therefore follow that the evidence obtained under the July 27th order of Mr. Justice Vetrano and those which follow it and which are dependent

upon it should have been suppressed as to petitioners Labriola and Slomka.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND THE JUDGMENT BELOW REVERSED OR A NEW TRIAL ORDERED AND THE EAVESDROPPING EVIDENCE SUPPRESSED

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Petitioners
LABRIOLA and SLOMKA

APPENDICES

APPENDIX A

OPINION OF JUDGE COSTANTINO

U. S. v. Principe, et al., 73 CR 972

A serious question is raised as to whether the conversations of defendants Ralph Principe, Sal and Michael Miciotta, and Dawn Slomka must be suppressed because they were oberheard in apparent violation of both New York Criminal Procedure Law §700.50 (3) and Title 18 U.S.C. § 2518 (8)(d). Each of these defendants received notification of the final extension of the eavesdropping more than one year after the termination of the final extension of the eavesdropping order. Although the statutes appear to mandate suppression of conversations overheard were no notices given within 90 days after termination of the period of an order or extensions thereof, the decision of United States v. Rizzo, 492, F. 2d 443 (2d Cir. 1974) interprets the statute with greater flexibility. The Court of Appeals held in Rizzo that "the touchstone to the determination whether to suppress wiretap evidence on a claim of failure of notice should be prejudice to the F. 2d 588 (2d Cir. 1973). These defendants received notice on November 8, 1973 but the suppression hearing was not held until more than one year later. In the absence of a showing of actual prejudice to the defendants and in view of adequate minimization of nonpertinent conversations, the motion is denied.

Defendants Labriola and Mandel were given notices about 120 days after termination of the final extention of the eavesdropping order. For reasons expressed as to defendants Principe, Slomka, Sal and Michael Miciotta, the motion is denied. As to all other defendants, the motion to suppress

pursuant to 18 U. S. C. §2518 (d) is clearly without merit and therefore denied.

All conversations overheard after 7:30 p. m. in violation of the court order of July 27, 1972 are hereby suppressed. This order does not include conversations overheard pursuant to orders not including the 7:30 limitation.

To reiterate my ruling previously made in open court, the orders of Justice Vetrano were properly issued with probable cause. Whatever defect appeared in the orders were not substantial and were corrected within a reasonable time.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 155, 156, 213—September Term, 1975.

(Argued September 19, 1975 Decided March 4, 1976.)

Docket Nos. 75-1175, 75-1176, 75-1177

UNITED STATES OF AMERICA,

Appellee,

—against—

RALPH PRINCIPIE, PAUL LABRIOLA and DAWN SLOMKA,

Appellants.

Before:

MOORE, FEINBERG and OAKES,

Circuit Judges.

Appeals from convictions in United States District Court for the Eastern District of New York, Mark A. Costantino, *J.*, of conspiracy to forge and utter United States savings bonds stolen from the mails, and forgery of such bonds, on ground that wiretap evidence was illegally obtained.

Affirmed.

JAY GREGORY HORLICK, Brooklyn, N.Y. (Zerin, Cooper & Horlick, on the brief), *for Appellant Principie.*

WILLIAM SONENSHINE, Brooklyn, N.Y. (Evseroff & Sonenshine; Jeffrey A. Rabin, Robert I.

Weiswasser, on the brief), *for Appellants Labriola and Slomka.*

ROBERT J. ERICKSON, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York; Shirley Baccus-Lobel, Attorney, Department of Justice, Washington, D.C., on the brief), *for Appellee.*

FEINBERG, *Circuit Judge:*

Paul Labriola, Dawn Slomka and Ralph Principie[1] appeal from convictions after a non-jury trial in the United States District Court for the Eastern District of New York, Mark A. Costantino, *J.*, of conspiracy to forge and utter United States savings bonds stolen from the mails in violation of 18 U.S.C. §§ 371, 495, 1708 (all three appellants), and forgery of United States savings bonds in violation of 18 U.S.C. § 495 (Labriola). Labriola was sentenced to two concurrent five-year terms of imprisonment and a $5,000 fine; Principie to four years' imprisonment; and Slomka to three years' imprisonment, suspended on condition that she place herself in a community program. All three appellants argue that their convictions must be reversed because much of the evidence against them was the product of electronic surveillance which was unlawful in a number of respects, and should have been suppressed. 18 U.S.C. §§ 2515, 2518(10)(a). We affirm.

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1 The proper spelling of appellant Principie's name is unclear from the record before us. The district court record generally refers to "Principe," while the briefs in this court use "Principie." We adopt the latter as presumably his own preference. As will be seen, the proper appellation of this appellant is a matter of some importance in the case.

I

Facts

Appellants were charged in November 1973 along with nine co-defendants, five of whom have since pleaded guilty, in a 26-count indictment with various counts of forging United States savings bonds and uttering them as true, possession of such bonds stolen from the mails, and conspiracy.[2] The indictment was the product of a lengthy investigation by the District Attorney of New York County. To understand the points raised by appellants, it is necessary to trace the course of that investigation.

In June 1972, an underworld figure informed the District Attorney's office that one Joseph Martino had offered to sell him stolen United States postal bonds. The serial numbers of the proffered bonds showed them to be missing from a New York brokerage firm. Martino had told the informer to call him at a certain telephone number, which was listed in the name of the 1234 Club, and ask for "Paul." Acting at the prosecutor's direction, the informer called Martino at that number. In the ensuing conversation, which was recorded, Martino discussed stolen bonds and made statements indicating the existence of co-conspirators, including someone called "Ralph."

On July 5, 1972, the New York Supreme Court, Larry M. Vetrano, *J.*, issued an order authorizing interception of "the telephonic communications of Joe Martino, his co-conspirators, agents and associates," including "Ralph," [3]

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2 In addition to the conspiracy count, in which all three appellants were named, Labriola was charged in all counts, involving over 500 bonds; Principie in 12 counts; and Slomka in two. All counts other than those on which appellants were convicted were dismissed on motion of the United States Attorney.

3 The order referred to "co-conspirators, agents and associates as described and delineated in paragraphs 23 and 24 of the herein incorpo-

at the 1234 Club number for thirty days. Interception of communications began on July 11. The officers who monitored the wiretap were instructed not to record privileged or social calls, but otherwise to record all conversations involving Joseph Martino, a person then known to them as "Ralph," anyone who responded to the name of "Paul" and discussed the theft or disposition of securities, or anyone who engaged in conversations about the procurement or disposition of stolen securities. Meanwhile, police officers maintained physical surveillance of the club, in the course of which they learned that Paul Labriola, who had a criminal record involving stolen checks, was a frequent visitor. No later than July 14, the investigators were aware that the "Paul" whose conversations they were recording was not Martino, but Paul Labriola.[4]

On July 27, the assistant district attorney supervising the investigation sought renewal and expansion of the wiretap order. Justice Vetrano issued a new order which named Martino, Labriola and "Ralph," as well as their co-conspirators, agents and associates, as targets of the investigation; extended until September 7 the wiretapping authority contained in the July 5 order; and included a further provision authorizing electronic surveillance ("bugging") of the 1234 Club. The latter aspect of the order was limited not only by the statutory "minimization" provision requiring the officers not to intercept innocent or

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rated affidavit of Leonard Newman," which paragraphs speak of "Martino, his co-conspirators, agents, associates and 'Ralph'."

4 On that date, a conversation between Martino and Labriola was intercepted. Even before that date, calls to "Paul" involving Labriola had been recorded, but the calls were short and the officers did not compare "Paul's" voice to available recordings of Martino's.

privileged conversations[5] but also by the additional proviso that conversations taking place after 7:30 P.M. were not to be intercepted.[6] While the police apparently respected the first condition, they ignored the second, and throughout the period during which the club was "bugged," interception and recording of conversations continued until midnight or later.

The July 27 order was extended on September 11. From about September 1, however, the conspirators moved their headquarters to another club, and no further conversations at the 1234 Club were recorded. On September 27, an order was obtained authorizing wiretapping of a telephone at the new location. This order was the first in which Ralph Principie was named in full, although the officers had known at least since mid-August, and possibly longer, that Principie was the "Ralph" whose conversations they were recording.[7] This order was in turn renewed on October 28, and the authorization finally expired on November 26. Labriola was notified of the electronic surveillance on December 13, but Principie and Slomka never received official notice that their conversations had been recorded, and learned of this for the first time in an informal conversa-

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5 18 U.S.C. § 2518(5) provides:

> Every order and extension thereof shall contain a provision that the authorization to intercept . . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . . .

N.Y. Crim. Proc. L. § 700.30(7) is substantially identical.

6 The reason for this limitation is not clear from the record, and none of the parties has explained it.

7 As early as late July, the investigators had some reason to believe Ralph Principie was involved in the affair, and had put him under observation. Some time in August, his voice was definitely identified as that of the "Ralph" whose conversations had been recorded, and on August 17, an informer told the police that Principie was involved in the securities thefts they were investigating.

tion with an FBI agent at the time of their indictment in November 1973.

Prior to trial, appellants moved to suppress the fruits of the electronic surveillance as illegally obtained. In January and February 1975, the district court held a lengthy evidentiary hearing at which the above facts concerning the investigation were developed. At the conclusion of the hearing, Judge Costantino held that the wiretap evidence was admissible. Although he agreed that appellants had not received timely notice, he held that they had not been prejudiced by the delay. The very brief non-jury trial, at which most of the evidence was stipulated to, followed immediately. Much of this evidence was the product of the challenged eavesdropping.

II

Identification defects in orders

Both Labriola and Principie contend that the wiretapping orders in this case were invalid because they were not properly identified in the applications and orders as required by law. Under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-20, applications and orders authorizing electronic interception of conversations must include "the identity of the person, if known, committing the offense and whose communications are to be intercepted." 18 U.S.C. §§ 2518(1)(b)(iv), 2518(4)(a). Cf. N.Y. Crim. Proc. L. §§ 700.20(2)(b)(iv), 700.30(2). Labriola argues that he was "known" within the meaning of the statute by July 14, but was not identified in an order until July 27; Principie that he was known by August 17 at the latest, but not fully identified until the order of September 26.

The leading case interpreting the relevant statutory language is *United States* v. *Kahn*, 415 U.S. 143 (1974).

In *Kahn*, an order was obtained authorizing interception of the telephone conversations of *Mr.* Kahn, a suspected bookmaker, and "others as yet unknown." At trial, *Mrs.* Kahn argued that wiretap evidence obtained pursuant to this order could not be admitted against her because she was not named in the warrant. A divided panel of the Seventh Circuit agreed with her that although the Government, at the time the wiretap order was applied for, was unaware of her involvement in the crime under investigation, "careful investigation by the government would [have] disclose[d that she was] probably using the Kahn telephones in conversations for illegal activities," and therefore that she was "known" within the meaning of the statute and should have been named in the application and order. *United States* v. *Kahn*, 471 F.2d 191, 196 (7th Cir. 1972). The Supreme Court reversed, concluding that

> Title III requires the naming of a person in the application or interception order only when the law enforcement authorities have probable cause to believe that the individual is "committing the offense" for which the wiretap is sought.

415 U.S. at 155.

The rule that a person must be named in an interception order when probable cause exists to believe that he is involved in the crime under investigation has been followed in this and other circuits. *United States* v. *Chiarizio*, 525 F.2d 289, 291-92 (2d Cir. 1975); *United States* v. *Donovan*, 513 F.2d 337, 340-42 (6th Cir. 1975), cert. granted, 44 U.S.L.W. 3462 (U.S. Feb. 23, 1976); *United States* v. *Moore*, 513 F.2d 485, 492-94 (D.C. Cir. 1975); *United States* v. *Bernstein*, 509 F.2d 996, 1001-1002 (4th Cir. 1975), pet. for cert. filed, 43 U.S.L.W. 3637 (U.S. May 27, 1975). Contra, *United States* v. *Doolittle*, 518 F.2d 500 (5th Cir. 1975)

(en banc), pet. for cert. filed, 44 U.S.L.W. 3230 (U.S. Oct. 2, 1975).

The Government argues for a different rule. In its view, the statutory language, requiring the identification of the "person [singular], if known, committing the offense" indicates that there is no obligation to name any and all such persons. This argument from the language of the statute is buttressed by the policy argument that once there has been a judicial determination that probable cause exists to believe a crime is being committed and that conversations regarding that crime are being held over a particular telephone, and the principal target of the wiretap is identified, the public interest in privacy has been adequately protected. Requiring more, it is argued, would put police officers between Scylla and Charybdis: If the police omit a suspect and it is later determined that there was probable cause to include him, they violate the statute; if they include someone, and are later found not to have had probable cause, they also violate the statute (as well as the Constitution).[8]

These arguments, however, are addressed to the wrong forum. As we said in *Chiarizio*, "The legal standard to be applied under [Title III] has been explicitly established by the Supreme Court in *United States* v. *Kahn*," 525 F.2d at 292, and we are not free to set a different one. We need not, however, adopt the Government's reading of the statute in order to reject appellants' arguments that the applications and orders here were defective. As to each of them, a holding that the Government was required to do more than it did would go far beyond the holding in *Kahn*.

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8 This danger is illustrated in the instant case, in which Labriola argues simultaneously that he should have been identified earlier than he was, and that when he finally was named in an order, probable cause was lacking.

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"known [to be] committing the offense and whose communications are to be intercepted." Moreover, the lapse of time between discovery of Labriola's identity and the application for extension naming him as a suspect was only 13 days, a time period which has been held to conform to the New York statute's requirement, see note 9 supra, of amendment "as soon as practicable" when evidence of crimes not covered by a wiretap order is discovered. *People* v. *Sher*, 329 N.Y.S.2d 2, 8-10 (Greene Co. Ct. 1972) (Werker, *J.*)

Principie

Principie, unlike Labriola, was identified from the beginning. He argues that the statute was not complied with, however, because he was identified only as "Ralph," both in the initial application, when that was as far as he was known to the investigators, and in at least one renewal after his full name was known to them. His full name was first given in the September 27 order. We have found no reported cases that deal with this somewhat unusual situation. We believe that, in the circumstances of this case, the requirement that interception applications and orders "identify the person . . . committing the offense" was sufficiently complied with. On these facts, in the absence of some showing that the failure to identify Principie more fully was the result of bad faith on the part of the investigating officers, we fail to see how we can find error in admitting into evidence the fruits of a wiretap conducted under a court order based on a judicial determination that probable cause existed to monitor the conversations of this very defendant, merely because his last name was omitted from the order.

III

Probable cause

Labriola argues (1) that there was no probable cause to believe that he was involved in criminal activity when the July 27 order was obtained, and (2) that conversations, including those which were used to show probable cause to name him in the July 27 order, were recorded pursuant to the July 5 order that had no relation to the criminal activities designated in that order.

These contentions are easily disposed of. The determination of probable cause with respect to Labriola was based on two conversations intercepted pursuant to the July 5 order. While both conversations are somewhat cryptic and ambiguous, in light of explanations provided in an affidavit from one of the investigating officers concerning the meaning of various terms relating to securities, and the already established probable cause to believe that conversations involving stolen securities would take place on the telephone involved, the affidavit submitted contained sufficient basis for a finding of probable cause. Labriola's argument that the supporting affidavit contains no allegation that the "Paulie" involved in those conversations was Labriola is also without merit. In the first conversation, "Paulie" arranges a meeting with one Leon at a particular location; the affidavit states that surveilling police officers observed Labriola go to that location at the appointed time; in the second conversation, "Paulie" states that "I met Leon tonight." There was clearly sufficient basis in the supporting affidavit to warrant the conclusion that the "Paulie" of the incriminating conversations was Labriola.

The argument that conversations were recorded pursuant to the July 5 order which were beyond the scope of the order is equally without merit. The application

described the criminal activity being investigated as "the procurement and disposition of stolen securities," and the order specified the offenses to which the communications would relate as "Grand Larceny in the Second Degree," "Criminal Possession of Stolen Property in the First Degree" and "Conspiracy to commit said crimes." Labriola argues that because the original information leading to the commencement of the investigation involved the sale of stolen postal and industrial bonds, conversations dealing with future thefts of unspecified securities were outside the scope of the warrants. Such conversations clearly were within the scope of the order, however, and the order was drawn with sufficient particularity to meet the requirements of the statutes. 18 U.S.C. § 2518 (4)(c); N.Y. Crim. Proc. L. § 700.30(4). As we said in *United States* v. *Tortorello*, 480 F.2d 764, 780 (2d Cir.), cert. denied, 414 U.S. 866 (1973), such orders "must be broad enough to allow interception of any statements concerning a specific pattern of crime."

IV

Minimization

As noted above, the July 27 order authorized interception of oral communications in the 1234 Club only before 7:30 P.M., and the detectives conducting the bugging systematically ignored this restriction. No conversation seized in violation of the order was the basis for obtaining extensions of the eavesdropping orders, or was used against defendants at trial, because Judge Costantino ordered such evidence suppressed at the pre-trial hearing. Nevertheless, Labriola and Slomka argue that the failure of the officers to abide by the restrictive provision of the July 27 order requires the suppression of all conversations seized pursuant to that order. Whether

violation of "minimization" provisions requires such across-the-board suppression or whether those conversations that the order permitted to be seized may be admitted is a question which has divided both the federal and New York courts.

The minimization provision involved in the reported cases is a general requirement that the monitoring officers as far as possible minimize the interception of innocent conversations and limit their listening to communications involving criminal activity.[10] In each case, the police to a greater or lesser extent disregarded the order, listening indiscriminately to conversations involving criminal acts and to ones that were obviously innocent. Some courts have held that only the innocent conversations should be suppressed. The reasoning behind this result was expressed by the Eighth Circuit as follows:

> Clearly, Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The non-incriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted.

United States v. *Cox*, 462 F.2d 1293, 1301 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974). This argument is often supported by reference to the law with regard to other sorts of search warrants, which suppresses only seized items not covered by the warrant, but does not require suppression of items properly seized. *United States* v. *Sisca*, 361 F. Supp. 735, 745 (S.D.N.Y. 1973), aff'd on other

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10 Such a provision is required to be included in all eavesdropping orders. See note 5 supra.

grounds, 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974); *United States* v. *King*, 335 F. Supp. 523, 544-45 (S.D. Cal. 1971), rev'd on other grounds, 478 F.2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1974). Another argument is that across-the-board suppression is unfairly harsh, since minimization is a difficult task: Seemingly innocent conversations may be in code or underworld slang; conversations which begin with pleasantries may turn eventually to business matters; large conspiracies may involve many participants, some of whom may at first appear uninvolved. *United States* v. *Sisca*, supra, 361 F. Supp. at 747. See generally also *United States* v. *LaGorga*, 336 F. Supp. 190, 196-97 (W.D. Pa. 1971); *United States* v. *Mainello*, 345 F. Supp. 863, 874-77 (E.D.N.Y. 1972). Cases adopting this view generally remit the defendant to civil remedies for the interception of innocent conversations. See, e.g., *United States* v. *Cox*, supra, 462 F.2d at 1302.

The argument against selective suppression is well stated in *United States* v. *Focarile*, 340 F. Supp. 1033, 1046-47 (D.Md.), aff'd on other grounds sub nom. *United States* v. *Giordano*, 469 F.2d 522 (4th Cir. 1972), rev'd, 416 U.S. 505 (1974):

> In this court's opinion the minimization requirement of § 2518(5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial *after* the interception is a *fait accompli*. Minimization as required by the statute must be employed by the law enforcement officers *during* the wiretap, not by the court *after* the wiretap. . . . Knowing that only "innocent" calls would be suppressed, the government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at trial

only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III. A conversation once seized can never truly be given back as can a physical object. The right of privacy protected by the Fourth Amendment has been more invaded when a conversation which can never be returned has been seized than where a physical object which can be returned has been seized.

See also *United States* v. *Scott*, 331 F. Supp. 233, 246-49 (D. D.C. 1971); *United States* v. *Leta*, 332 F. Supp. 1357, 1360 n.4 (M.D. Pa. 1971).

A third view attempts to reconcile the two lines of authority by distinguishing between blatant violations of the statute, in which no attempt at minimization is made, and cases in which minimization is attempted, but the court concludes that the efforts were inadequate. See *United States* v. *Focarile*, supra, 340 F. Supp. at 1046.[11]

Whatever view we may take of this controversy in the abstract, we note that this case is somewhat different from those discussed above. The police in this case violated not

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11 Labriola and Slomka argue that even if the federal law is unclear, we are bound by the decisions of the New York courts interpreting the New York statute, see *United States* v. *Capra*, 501 F.2d 267, 276 (2d Cir. 1974), cert. denied, 420 U.S. 990 (1975), which they contend is more restrictive. We reject appellants' characterization of New York law. Although two New York cases have adopted the total suppression remedy, *People* v. *Holder*, 331 N.Y.S.2d 557 (Sup. Ct. Nassau Co. 1972); *People* v. *Castania*, 340 N.Y.S.2d 829 (Monroe Co. Ct. 1973), both are lower court decisions. Neither purports to adopt the view that New York has a different and stricter rule than that required by federal law; both rely on *United States* v. *Scott*, 331 F. Supp. 233 (D. D.C. 1971), and discuss federal as well as state precedents. Moreover, a more recent lower court decision more thoroughly reviews the cases and opts for selective suppression. *People* v. *Solomon*, 348 N.Y.S.2d 673 (Sup. Ct. Kings Co. 1973). Insofar as we must interpret the New York statute as well as the federal law, we believe it most rational not to interpret the substantially identical statutes differently.

the general, statutorily-required injunction to minimize interception of innocent conversations, but rather a specific aspect of the order prohibiting interception of *any* conversations after 7:30 P.M. This significantly alters the considerations on each side. The Government cannot make the argument that the police were trying in good faith to make delicate judgments about which calls were innocent and which incriminating; the violation of the order was by its nature blatant and apparently extensive as well. On the other hand, the most persuasive argument favoring across-the-board suppression does not apply in this case—the district judge suppressed evidence that could be useful to the Government as well as conversations that were innocent. To that extent, the suppression already ordered should have a deterrent effect. Moreover, we are less inclined to use the drastic remedy of suppressing conversations that were themselves seized legally because other conversations were seized in violation of a minimization order, where the minimization order in question is a limited one whose purpose has never been made clear to us, than we might be in the case of the usual minimization order, which embodies a statutory requirement central to the policy of Title III. In the unique circumstances of this case, we conclude that only those conversations which were seized in violation of the time limitation in the order had to be suppressed.

V

90-day notice

All three appellants argue that the wiretap evidence against them must be suppressed because the Government failed to notify them of the eavesdropping within 90 days after it terminated, as required by 18 U.S.C. § 2518(8)(d) and N.Y. Crim. Proc. L. § 700.50(3). We reject these arguments.

Principie

The district court denied Principie's motion to suppress wiretap evidence against him on the ground that there was no "showing of actual prejudice to the defendants" from the failure of the police to provide timely notice, citing *United States* v. *Rizzo*, 492 F.2d 443, 447 (2d Cir.), cert. denied, 417 U.S. 994 (1974); and *United States* v. *Manfredi*, 488 F.2d 588, 601-02 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974).

The courts that have considered the issue have divided over whether the failure to give the statutory post-termination notice requires suppression of all wiretap evidence without a further showing of prejudice. Holding that no showing of prejudice is required are *United States* v. *Donovan*, supra, 513 F.2d 337 (6th Cir.), and *United States* v. *Bernstein*, supra, 509 F.2d 996 (4th Cir.); cf. *United States* v. *Chun*, 503 F.2d 533, 541-43 (9th Cir. 1974). Contra, *United States* v. *Bohn*, 508 F.2d 1145, 1148 (8th Cir.), cert. denied, 421 U.S. 947 (1975); *United States* v. *Iannelli*, 477 F.2d 999, 1003 (3d Cir. 1973), aff'd on other grounds, 420 U.S. 770 (1975); *United States* v. *Wolk*, 466 F.2d 1143 (8th Cir. 1972). This court has held that such a showing is required. *United States* v. *Rizzo*, supra.

Appellant Principie relies heavily on *United States* v. *Giordano*, 416 U.S. 505 (1974), and it may be that that case and its companion, *United States* v. *Chavez*, 416 U.S. 562 (1974), both of which were decided after our decision in *Rizzo*, undercut its holding. The argument would be that suppression is required, even without a showing of prejudice, when the provision violated plays a "central role in the statutory scheme," 416 U.S. at 528, and that the 90-day notice provision does play such a role. These later Supreme Court decisions were the basis of the holdings in *United States* v. *Donovan*, supra, and *United States* v. *Bernstein*,

supra, both of which are contrary to our holding in *Rizzo* that prejudice is required. The argument is substantial enough to engender doubt about this aspect of *Rizzo* in the minds of at least two members of this panel who were also members of the panel in that case. However, certiorari has been granted in *Donovan*, 44 U.S.L.W. 3462, and a petition for certiorari is pending in *Bernstein*. Under the circumstances, it seems appropriate at this time to adhere to our prior holding, without full-scale reconsideration either by this panel alone or by the full court in the en banc proceeding that would probably be required. Therefore, Principie's failure to show that he was prejudiced in any way requires that Judge Costantino's rejection of his suppression motion be affirmed.[12]

Although the rationale discussed above also disposes of the similar claims of Labriola and Slomka, additional considerations also require rejection of their arguments, as set forth below.

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12 Once again we reject the argument that the New York statute is to be interpreted as more restrictive than the federal. The only New York decision we have found that held suppression necessary on similar facts without requiring a showing of prejudice is *People* v. *Tartt*, 336 N.Y.S. 2d 919 (Sup. Ct. Erie Co. 1972). But the careful opinion of the court in that case holds that the *federal* statute requires such suppression, following *United States* v. *Eastman*, 465 F.2d 1057 (3d Cir. 1972), a decision which has since been held not to apply to circumstances like those before us. *United States* v. *Cafero*, 473 F.2d 489, 499 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); see also *United States* v. *Iannelli*, 477 F.2d 999, 1003 (3d Cir. 1973), aff'd on other grounds, 420 U.S. 770 (1975). Although the New York Court of Appeals has referred to *Tartt* without disfavor, *People* v. *Hueston*, 34 N.Y.2d 116, 356 N.Y.S.2d 272, 276 (1974), the reference is clearly dictum which leaves the question open. See also *People* v. *Kennedy*, 347 N.Y.S.2d 327, 333 (Greene Co. Ct. 1973); *People* v. *DiLorenzo*, 330 N.Y.S.2d 720, 728 (Rockland Co. Ct. 1971). In the absence of a more definitive statement of New York law, we cannot interpret the New York statute differently than the substantially identical federal law. See note 11 supra.

Labriola

Labriola received the written notice mandated by the federal and New York statutes on December 13, 1972. The statutes require written notice "within a reasonable time but not later than ninety days after the filing of an application . . . which is denied or the termination of the period of an order or extensions thereof." 18 U.S.C. § 2518(8)(d).[13] The last order covering the 1234 Club was issued on September 11. The order was renewed and amended on September 27, to cover a different telephone, because the conspirators had moved their base of operations. This later authorization was again renewed, and expired on November 26. If the 90-day period within which notice is required is counted from this date, the notice to Labriola on December 13 was obviously timely. Labriola argues, however, that the period should commence on September 1, because interception of communications at the 1234 Club pursuant to the July 27 order was voluntarily abandoned by the investigators at about this time. This argument was apparently accepted by Judge Costantino, who ruled that Labriola had not received timely notice, but that the conversations were nevertheless admissible because Labriola had not been prejudiced by the delay.

We believe that the 90-day period should be calculated from November 26. The language of the statute indicates that notice is due 90 days after the "termination of the period of an order or extensions thereof," not 90 days after the police stop monitoring conversations.[14] In this case,

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13 The New York statute is substantially identical. N.Y. Crim. Proc. L. § 700.50(3).

14 There was some dispute below about whether the September 11 order can be treated as an extension of the earlier order or was instead a new order, because there was a brief hiatus between expiration of the July 27 order and the obtaining of the renewed authorization, and because the September 11 order did not state that it was an extension. We do not regard these facts as determinative. The September 11 order was

the authorization to intercept conversations at the 1234 Club was renewed on September 11, and again, amended to cover a new location, renewed twice subsequently. The investigation continued, and Labriola continued to be named in the orders as a subject of court-authorized wiretapping. To interpret the statute to require 90 days after September 1, in these circumstances, would frustrate the evident intention of the statute to defer notice to the end of the investigation, without any justification in policy or the language of the statute.

Slomka

Slomka, like Principie, received no formal notice of the interception of her conversations, and did not receive actual notice from the Government until the day the indictment was filed, about a year after the last order expired. Her position is different from his in one crucial respect. Principie was named in all of the eavesdropping orders,[15] and thus post-termination notice to him was mandatory under section 2518(8)(d). Slomka was not named in any of the orders, although some of her conversations were intercepted. Thus, she was only entitled to notice "as the judge may determine in his discretion . . . in the interest of justice." There has been no showing that the determination not to give notice to Slomka, who was apparently a relatively minor participant in the conspiracy, was an abuse of discretion. See *United States* v. *Rizzo*, supra, 492 F.2d at 447.

Accordingly, the convictions of all three appellants are affirmed.

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clearly part of the same investigation of the same individuals conducting the same criminal enterprise as the July 27 order and in these circumstances must be regarded as an "extension" of the earlier order within the meaning of the statute.

15 Although he was named incompletely in some, see Part II above, there is no dispute that he is the "Ralph" named in the orders.

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APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the fourth day of March, one thousand nine hundred and seventy six.

Present : HON. LEONARD P. MOORE

HON. WILFRED FEINBERG

HON. JAMES L. OAKES

Circuit Judges,

United States of America,

Plaintiff-Appellee,

75-1175
75-1176
75-1177

-against-

Ralph Principe, Paul Labriola, Leon Hunter, Theodore Mandel, William Sevransky, Dawn Slomka, Ralph Baldassare, Sal Marzigliano, Sal Miciotta, Jerome Schulman, Michael Miciotta, William Brown,
Defendants

Ralph Principe, Paul Labriola, Dawn Slomka,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court

for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgments of said District Court be and they hereby are affirmed in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

By
Vincent A. Carlin,
Chief Deputy Clerk

APPENDIX D

§700.15 Eavesdropping warrants; when issuable

An eavesdropping warrant may issue only:

1. Upon an appropriate application made in conformity with this article; and

2. Upon probable cause to believe that a particularly described person is committing, has committed , or is about to commit a particular designated offense; and

3. Upon probable cause to believe that particular communications concerning such offense will be obtained through eavesdropping and;

4. Upon a showing that normal investigative procedures have been tried and have failed, or rasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ; and

5. Upon probable cause to believe that the facilities from which, or the place where, the communications are to be intercepted, are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

§700.20

***2. The application must contain:

(a) The identity of the applicant and a statement of the applicant's authority to make such application; and

(b) A full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an eavesdropping warrant should be issued, including (i) a statement of facts

establishing probable cause to believe that a particular designated offense has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of the communications sought to be intercepted, and (iv) the identity of the person, if known, committing such designated offense and whose communications are to be intercepted; and***

§700.50

***3 Within a reasonable time, but in no case later than ninety days after termination of an eavesdropping warrant, or expiration of an extension order, except as otherwise provided in subdivision four, written notice of the fact and date of the issuance of the eavesdropping warrant, and of the period of authorized eavesdropping, and of the fact that during such period communications were or were not intercepted, must be personally served upon the person named in the warrant and such other parties to the intercepted communications as the justice may determine in his discretion is in the interest of justice. The justice, upon the filing of a motion by any person served with such notice, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and warrants as the justice determines to be in the interest of justice. ***

§700.65

***4. When a law enforcement officer, while engaged in intercepting communications in the manner authorized by this article, intercepts a

communication which was not otherwise sought and which constitutes evidence of any crime that has been, is being or is about to be committed, the contents of such communications, and evidence derived therefrom, may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be disclosed or used as provided in subdivisions one and two. Such contents and any evidence derived therefrom may be used under subdivision three when a justice amends the eavesdropping warrant to include such conetents. The application for such amendments must be made by the applicant as soon as practicable. If the justice finds that such contents were otherwise intercepted in accordance with the provisions of this article, he may grant the application.

Constitution of the U. S.

Amendment [IV]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Constitution of the U. S.

Amendment XIV

***No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State depirve any person of life, liberty or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws. ***

New York State Constitution

Article 1 §6

No person shall be deprived of life, liberty or property without due process of law.